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No. 84-1697

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

o

Eugene Ewan Mori

Petitioner,

v.

Melvin Gittleman

Respondent.

o

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

o

BRIEF IN OPPOSITION

o

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TABLE OF CONTENTS

	Page
Statement of the Question Presented	1
Statement of the Case	2
Summary of Argument	9
ARGUMENT	
I. Petitioner's Claims Against Mr. Gittleman are Barred By The Doctrine of Res Judicata	11
II. The Court's Earlier Judgment Dismissing the Complaint Against the Bank of New Jersey Collaterally Barred Any Action Against Defendant Gittleman	17
III. Petitioner's Claims Were Barred By His Failure To Assert Said Claims in the Bankruptcy Proceeding	24
IV. Plaintiff Waived and Was Estopped from Asserting Any Claims Against Mr. Gittleman for any Sums	29
Conclusion	33

TABLE OF AUTHORITIES

Page

CASES

Blonder-Tongue v. University Foundation
402 U.S. 313, 28 L.Ed 2d 788, 91 S.Ct. 1434 (1971)..... 19

Brauberger v. Sheridan
7 N.J. Super. 576 (Ch. Div. 1950)..... 12

Brown v. Fidelity Union Trust Co.
135 N.J. Eq. 404, 407 (Ch. 1944)..... 16

Carlson v. Masters, Mates & Pilots Pension Plan Trust
80 N.J. 334, 403 A.2d 880 (1979)..... 31

City Bank Farmers Trust Co. v. McCarter
111 N.J. Eq. (Ch. 1932).....13,15

Continental Can Co. v. Hudson Foam Latex Products
129 N.J. Super. 426 (App. Div. 1974).... 21

Desmond v. Kramer
96 N.J. Super. 96 (Union Cty. Ct. 1967). 21

Dunham v. Marsh
52 N.J. Eq. 831 (E. & A. 1895)..... 14

First National Bank v. Lasater
196 U.S. 115, 25 S.Ct. 206, 49 L.Ed 408 (1905).....24,26

Goechenour v. Cleveland Terminals Bldg. Co.
118 F.2d 89, 93 (6th Cir. 1941)..... 27

Gravure Paper & Board Corp.
234 F.2d 928 (3d Cir. 1956)..... 31

TABLE OF AUTHORITIES (Cont'd)

Page

Hanover Insurance Co. v. Tyco Industries, Inc.
500 F.2d 654 (3d Cir. 1974)..... 25

Mayer v. Development Corp. of America
541 F. Supp. 828 (D.N.J. 1981)..... 32

Melosh v. Melosh
125 N.J. Eq. 486 (Ch. 1939)..... 13

Poulson v. National Bank of Frenchtown
33 N.J. Eq. 250 (Prerog. 1880)..... 14

Slater's Estate
88 N.J. Eq. 296 (Prerog. 1917)..... 13

State v. Gonzalez
75 N.J. 181, 186 (1977).....19,20, 22

State by Parsons v. U.S. Steel Corp.
22 N.J. 341, 126 A.2d 168 (1956)..... 31

Stein v. United Artists Corp.
691 F.2d 885 (9th Cir. 1982).....25,27

United Rental Equipment Co. v. Aetna Life & Casualty Insurance Co.
74 N.J. 92 (1977)..... 21

Van Buren v. Plainfield Trust Co.
130 N.J. Eq. 244 (Ch. 1941).....12,16

West Jersey Title & Guaranty Co. v. Industrial Trust Co.,
27 N.J. 144, 141 A.2d 782 (1958)..... 32

Statutes and Court Rules

	Page
N.J.S. 3B:17-8.....	11,17
N.J.Ct.R. 4:87-7.....	14
Bankruptcy Rule 108.....	24

STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals for the Third Circuit err as a matter of law in upholding the decision of the District Court for the District of New Jersey to dismiss the Complaint against defendant Melvin Gittleman on the basis of res judicata and collateral estoppel?

STATEMENT OF THE CASE

Petitioner filed a complaint in this matter on July 30, 1982, naming as defendants Melvin Gittleman and the Bank of New Jersey as Administrator of the Estate of Eugene Mori, deceased, the Petitioner's father. (the "Bank" or the "Administrator"). Count One of the complaint alleged that the defendants wrongfully misappropriated drafts they received from the Township of North Bergen which were actually payable to Petitioner. Count Two of the complaint alleged that Mr. Gittleman's wrongful misappropriation of Petitioner's funds was a substantial factor contributing to Petitioner's filing of his voluntary petition in bankruptcy and resulted in other harm to Petitioner.

The United States District Court for the District of New Jersey, per the Honorable Clarkson S. Fisher, Chief Judge, dismissed the complaint as against

the Bank on March 16, 1983. App. 1a (References are to Petitioner's Appendix.) The Court held that since Petitioner, a party to the administration proceedings regarding his father's estate, failed to object to the Bank's accountings in those proceedings, he was barred by the doctrine of res judicata from bringing his action against the Bank. Petitioner has not appealed that order.

Mr. Gittleman moved for summary judgment on June 17, 1983, because the sums Petitioner claims were wrongfully misappropriated were part of the sums adjudicated to be proper in the Bank's accountings. United States Magistrate Haneke issued his Report and Recommendation on June 27, 1984. App. 14a. The District Court, per the Honorable Clarkson S. Fisher, adopted the Magistrate's report and granted summary judgment in Mr. Gittleman's favor on July 10, 1984. App. 47a.

Petitioner appealed that order. On January 29, 1985, the United States Court of Appeals for the Third Circuit upheld the District Court's grant of summary judgment. App. 44a.

The petition for writ of certiorari followed.

STATEMENT OF FACTS

On or about June 19, 1974, Petitioner retained Mr. Gittleman to prosecute tax appeals for numerous parcels of property in the Township of North Bergen, New Jersey in which Petitioner owned a 25 percent interest and his father owned a 75 percent interest. Mr. Gittleman not only achieved substantial reductions in the real estate tax assessment for these parcels, but he also discovered that the Moris were paying taxes on numerous parcels which they had not owned for years and was able to obtain large refunds for these properties, as well. For the years 1974 through 1978, Mr.

Gittleman obtained assessment reductions in excess of $3 million and tax savings of almost $500,000.00 for the Moris. Additionally, he obtained tax reductions for 1979 and 1980.

Petitioner's father died on October 8, 1975. The Bank was named Administrator of his estate. As Administrator, the Bank authorized Mr. Gittleman to continue with his prosecution of tax appeals for all of the Moris' property in North Bergen, in return for which Mr. Gittleman was to be compensated in an amount equal to one-sixth of the tax savings obtained, plus out-of-pocket disbursements.

On November 18, 1977, the Hudson County Court issued a Consent Order partitioning the real property on the basis of 75 percent to the estate of Petitioner's father and 25 percent to Petitioner.

The Probate Court approved the Bank's interim accounting on February 28, 1978.

As part of this accounting, the Court approved Mr. Gittleman's application for fees incurred before the death of Petitioner's father in the amount of $4,164.14. Petitioner's share of these fees was $1,388.04.

On June 27, 1979, the Probate Court entered an Order approving, as part of the Bank's Third Intermediate Accounting, the Bank's payment of 75 percent of Mr. Gittleman's fee for tax appeals for the years 1975 through 1978. The Court explicitly stated that Petitioner was responsible for the remaining 25 percent of Mr. Gittleman's fee, or $20,402.11.

Petitioner never objected to Mr. Gittleman's fees when the matter was before the Probate Court, either with regard to the interim accounting or the Third Intermediate Accounting.

Although tax settlements were agreed upon through tax year 1978, the assessor for the Township of North Bergen

reinstituted the old assessments on all of the Mori properties in North Bergen. Petitioner authorized Mr. Gittleman to prosecute appeals for the years 1979 and 1980. The two spoke about the appeals constantly and Petitioner sent Mr. Gittleman a letter authorizing further legal action. Mr. Gittleman achieved a substantial reduction of taxes for these years, resulting in a further fee owed him by Petitioner of at least $9,954.14.

The total fees owed by Petitioner to Mr. Gittleman in 1979 amounted to more than $31,744.29. Petitioner was advised that Mr. Gittleman was withholding about that sum from North Bergen tax refunds not only by all the court papers relating to the Third Intermediate Accounting, every one of which was served on Petitioner, but also by a 1979 letter to Petitioner from Vincent J. Gentile of the Bank. Petitioner never complained to a court about the retention of those fees

until the institution of this suit in 1982.

Meanwhile, the Bank, as Administrator, obtained a judgment against Petitioner on February 8, 1979 in the amount of $1,480,000.00 plus interest. This sum included substantial amounts due to the Bank by Petitioner for his 25 percent share of the real estate taxes the Bank had to pay during the previous several years to protect the Estate's interest in the Mori properties.

Petitioner managed to obtain two postponements of the enforcement of the judgment by representing, among other things, that he intended to sell his portion of the property. Finally, on April 19, 1979, Petitioner's application for a temporary restraining order enjoining a sheriff's sale scheduled for 2:00 p.m. that afternoon was denied. At 10:45 a.m. that same day, Petitioner filed a voluntary petition under Chapter

XII of the Bankruptcy Act, 11 U.S.C. §§1 et seq., in the United States District Court for the District of New Jersey (Bankruptcy No. B-79-00895), and thereby obtained an automatic stay of the impending sheriff's sale.

The Petitioner's schedules submitted in connection with his bankruptcy proceeding listed liabilities of approximately $6,600,000.00 and assets in excess of $24,000,000.00. Petitioner never listed a claim against Mr. Gittleman as an asset, either in his initial schedules or in any of his supplemental schedules.

SUMMARY OF ARGUMENT

Petitioner is barred by the doctrines of res judicata and collateral estoppel from relitigating that portion of Mr. Gittleman's fees which was approved by the Probate Court, namely $21,877.47. He is barred by the doctrines of waiver and collateral estoppel from objecting to the balance of Mr. Gittleman's fees, or $9,954.14, because he authorized Mr. Gittleman to continue representing him for two years after the Probate Court's decision. Furthermore, Petitioner is barred from asserting the entire claim against Mr. Gittleman because he failed to list it as an asset during his bankruptcy proceedings.

ARGUMENT
I.

PETITIONER'S CLAIMS AGAINST MR. GITTLEMAN ARE BARRED BY THE DOCTRINE OF RES JUDICATA

Petitioner's claim, at least to the extent of $21,877.47, is barred by the doctrine of res judicata. This is the amount of fees Petitioner owed Mr. Gittleman which the Probate Court approved during the intermediate accountings. These accountings are conclusive on all issues raised or which might have been raised before that court. Petitioner had the opportunity and the standing to object to Mr. Gittleman's fee then, but he did not do so. He cannot now relitigate the question.

N.J.S. 3B:17-8 reads:

> A judgment allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken

> to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of other matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those in privity with or represented by interested parties except:
>
> a) for the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;
> b) insofar as exceptions to the account shall be taken and sustained; and
> c) as relief may be had from a judgment in any civil action. [emphasis added]

An intermediate accounting has just as conclusive an effect on the issues it decides as a final accounting. See Brauberger v. Sheridan, 7 N.J. Super. 576 (Ch. Div. 1950, Van Buren v. Plainfield Trust Co., 130 N.J. Eq. 244 (Ch. 1941),

Melosh v. Melosh, 125 N.J. Eq. 486 (Ch. 1939), City Bank Farmers Trust Co. v. McCarter, 111 N.J. Eq. 315 (Ch. 1932), In re Slater's Estate, 88 N.J. Eq. 296 (Prerog. 1917).

In the accounting of February 27, 1978, the court approved, without reduction, Mr. Gittleman's fees for services rendered before the death of Petitioner's father. The court ordered the Petitioner's father's estate to pay 75 percent of these fees, or $4,164.14, and noted that Petitioner owed the other 25 percent or $1,388.04.

In the Third and Intermediate Accounting of the estate on June 27, 1979, the court approved without reduction Mr. Gittleman's fees and expenses for services rendered after the death of Petitioner's father. The court ordered the estate to pay 75 percent of the fees, or $60,804.32, and 75 percent of the expenses, or $402.00. Again, the

court noted that 25 percent of the costs were chargeable to Petitioner. Plaintiff's share amounted to $20,268.11 in fees and $134.00 in costs, for a total of $20,402.11.

Petitioner had ample opportunity to object to Mr. Gittleman's fees before the court. In any action for the settlement of an account, an interested person may serve upon the accountant written exceptions to any item in, or omission from, the account. N.J. Ct. R. 4:87-7. Petitioner was clearly an interested person, as he was a beneficiary of the estate and, in that suit, he claimed to be a creditor of the estate. Hence, Petitioner was entitled to file exceptions. See Dunham v. Marsh, 52 N.J. Eq. 831 (E. & A. 1895), Poulson v. National Bank of Frenchtown, 33 N.J. Eq. 250 (Prerog. 1880). However, Petitioner did not do so, although he does not deny being served with all relevant court

papers which informed him of Gittleman's retention of his fee. Nor did Petitioner file objections to the Fourth and Intermediate Accounting of March 20, 1981, which restated the set-off of Petitioner's tax refund against his debts.

In addition to all of the court papers Petitioner received, Petitioner also received a letter dated June 5, 1979, from Vincent Gentile of the Bank of New Jersey, expressly setting forth the fees retained by Mr. Gittleman. It was incumbent upon plaintiff to file exceptions in court to retain his objections to the fees. Since he failed to do so, he lost his right to assert them.

Once the court approved an accounting, its judgment is final on all items contained therein. The court in City Bank stated that intermediate decrees "are conclusive on all questions

which were raised or which might have been raised and upon all parties to the accounting proceedings, or represented therein." 111 N.J. Eq. at 317. In Brown v. Fidelity Union Trust Co., the court held an accounting conclusive "against all the world, including creditors, legatees, and other beneficiaries." In holding an intermediate accounting final, the court in Van Buren stated that "it is fundamental law that that account cannot be inquired into collaterally in another court." 130 N.J. Eq. at 247.

By his silence, Petitioner assented to the reasonableness of Mr. Gittleman's fees, and the probate court settled the reasonableness conclusively. Petitioner cannot now dispute the $21,790.15 covered by the intermediate accountings. The decision below was correct and a writ of certiorari should not be granted.

II.

THE COURT'S EARLIER JUDGMENT DISMISSING THE COMPLAINT AGAINST THE BANK OF NEW JERSEY COLLATERALLY BARRED ANY ACTION AGAINST DEFENDANT GITTLEMAN

Because of the res judicata effect of the Probate Court accountings, the Honorable Clarkson S. Fisher, in his March 16, 1983 Opinion, granted the Bank of New Jersey's motion seeking to have the complaint dismissed as against it. Petitioner filed no objections or exceptions in these proceedings. Judge Fisher's decision, with respect to Petitioner's claims against Mr. Gittleman, collaterally estops Petitioner from now asserting that the probate proceedings are not res judicata in this new action.

The Court relied on N.J.S. 3B:17-8, quoted above, and the pertinent cases in granting the Bank's motion. The Court noted (at App. 7a):

> "...the courts of New Jersey have consistently held that since 1905 the statute has given conclusive effect to intermediate as well as final accountings."

Mr. Gittleman's fees, at least to the extent of $20,410.43, were determined to be reasonable by virtue of the Court's order on the Bank's Third Intermediate Accounting in the probate action. Since the intermediate accountings of the probate court were adjudged in this action to bar Petitioner's causes of action against the Bank based on the doctrine of res judicata, the Petitioner was collaterally estopped from denying the res judicata impact of the intermediate accountings with respect to Mr. Gittleman's fees. Mr. Gittleman's fees were part of the intermediate accounting already held to be res judicata in this action. Petitioner, by virtue of the doctrine of collateral estoppel, is barred from attacking Mr. Gittleman's fees, at least with respect to the sum of $20,410.43.

The law of collateral estoppel is now well established. Collateral estoppel is that branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally, although not exclusively, between the same parties involving a different claim or cause of action. State v. Gonzalez, 75 N.J. 181, 186 (1977). Under the facts of this case, the Court should apply the doctrine of defensive collateral estoppel. In Blonder - Tongue v. University Foundation, 402 U.S. 313, 328-330, 28 L.Ed 2d 788, 91 S.Ct. 1434 (1971), Justice White, speaking for the United States Supreme Court, discussed the rationale for permitting the use of defensive collateral estoppel:

> Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded

> dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. The question in these terms includes as part of the calculus the effect on judicial administration, but it also encompasses the concern exemplified by Bentham's reference to the gaming table in his attack on the principle of mutuality of estoppel. In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. . . Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure' [citation omitted].

Thus, the Supreme Court has abandoned the strict requirements of mutuality (which treated identity of parties as a strict prerequisite to giving conclusive effect to a prior judicial determination of a matter, see State v. Gonzalez, 75 N.J. at 1880), favoring estoppel of a

plaintiff who has previously litigated an issue from relitigating the same issue against a different defendant. That is exactly what Petitioner is attempting to do here.

The New Jersey courts have frequently permitted parties to subsequent litigations to assert collateral estoppel both offensively and defensively. See United Rental Equipment Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92 (1972); Continental Can Co. v. Hudson Foam Latex Products, 129 N.J. Super. 426 (App. Div. 1974); Desmond v. Kramer, 96 N.J. Super. (Union Cty. Ct. 1967).

The doctrine of "defensive" collateral estoppel was properly applied by the district court. Petitioner already had "one bite at the apple" in the Bank's motion to try to avoid the impact of res judicata on his action below. The Court

ruled that res judicata barred Petitioner's action. Petitioner nevertheless seeks to have this Court ignore the intermediate accounting with respect to his claims against Mr. Gittleman. He cannot do so.

The three requirements for collateral estoppel cited with approval by Justice Pashman in State v. Gonzalez, 75 N.J. 181, are satisfied in the present action. These factors will be discussed seriatam:

a) Identity of Issue: Petitioner contended in his opposition to the Bank's motion that the intermediate accountings did not have res judicata effect. His contention was rejected by the court. Therefore, the issue presented by the two defendant is identical.

b) Was the prior action on the merits? The foregoing discussion reveal in no uncertain terms that this very issue, the res judicata impact of the

intermediate accountings, was decided on the merits on the Bank's motion. It was fully and completely litigated and has not been appealed.

c) Identity of Parties: The party against whom the doctrine is asserted, Petitioner, was himself the party in the earlier litigation. No issues of privity even exist.

Therefore, it is clear beyond any question that Petitioner is barred from denying the res judicata impact of the intermediate accountings in the probate proceedings. The complaint, to the extent set forth above, was properly dismissed.

III.

PETITIONER'S CLAIMS WERE BARRED BY HIS FAILURE TO ASSERT SAID CLAIMS IN THE BANKRUPTCY PROCEEDING

Petitioner failed to list his right to this action among his assets during his bankruptcy proceedings. He was thus barred from now asserting such claim.

A bankrupt must file with the court a schedule of all of his property. Bankruptcy Rule 108(a). Further, the bankrupt is under a continuous duty to disclose any new interests arising or acquired within six months after bankruptcy. Rule 108(e). Such supplemental schedules must be filed within ten days of the bankrupt's discovering the information. Id. A cause of action is an asset of the bankrupt estate; as such, it must be disclosed. See First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49

L.Ed. 408 (1905), Hanover Ins. Co. v. Tyco Industries, Inc., 500 F.2d 654 (3d Cir. 1974), Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982).

During two years of bankruptcy proceedings, Petitioner never once disclosed to the bankruptcy court that he had a claim against Mr. Gittleman. Petitioner filed his petition April 19, 1979 and his schedule of assets May 14. On June 5, Vincent Gentile wrote to advise Petitioner of Mr. Gittleman's retention of his fee. Yet Petitioner never informed the court that the estate might now have a cause of action against Mr. Gittleman, notwithstanding that the court twice that summer ordered Petitioner to submit revised schedules. Nor did Petitioner so advise the court at any other time through and including when the court ordered the implementation of a final settlement on May 15, 1981. Now, in this action, Petitioner seeks to

assert this claim for the first time. If Petitioner ever possessed a valid cause of action, he has lost it by concealing it during bankruptcy.

The Supreme Court first considered this issue in First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408 (1905). In that case, the Court refused to allow a discharged debtor to assert a claim he had kept secret from the trustee in bankruptcy and the creditors:

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value...it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

Id. at 119, 25 S.Ct. at 208.

It is irrelevant that no trustee was appointed and Petitioner was named debtor in possession, as the Ninth Circuit explained in Stein:

> The debtor in possession is a fiduciary and owes the same duties as a trustee. Gochenour v. Cleveland Terminals Bldg. Co., 118 F.2d 89,93 (6th Cir. 1941). The debtor in possession is strictly supervised by the bankruptcy court, and his actions, including abandonment, must be approved. The bankrupt does not act in his own interests until he reverts to his former status upon discharge and confirmation of the plan. The extent of the fiduciary duties should not vary with the identity of the one who performs that role. The dangers resulting from the concealment of assets are greater when the debtor remains in possession than in cases in which a third party acts as trustee. An outside trustee is a separate merchanism for discovering unlisted claims or assets. If a debtor in possession were permitted to omit claims in bankruptcy and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests. Such a rule would undermine the fiduciary status of the debtor in possession. Whether or not the failure to list the asset in the case before us was intentional, the opportunity for concealment must be considered in formulating the proper general rule.

691 F.2d at 892.

It is significant that the final order of the bankruptcy court does not list a claim against Mr. Gittleman as one that was preserved to the Petitioner. In contrast, the Petitioner's claim against the Bank of New Jersey, to the extent he had such a claim, was specifically referred to in the bankruptcy court's final order.

By not listing a cause of action against Gittleman among his assets in bankruptcy, Petitioner lost his right to bring this suit.

IV

PLAINTIFF WAIVED AND WAS ESTOPPED FROM ASSERTING ANY CLAIMS AGAINST MR. GITTLEMAN FOR ANY SUMS

By his conduct after the Probate Court's approval of the accountings, Petitioner has waived his right to object to the $9,954.14 Mr. Gittleman retained for tax years 1979 and 1980.

After the probate proceedings concluded, Petitioner not only knew of Mr. Gittleman's continued actions in the tax appeals, but confirmed that Mr. Gittleman, as his attorney, would appeal the erroneous assessments made by the Township of North Bergen. Mr. Gittleman filed appeals for 1979 and 1980, obtained substantial reductions, and when he received the drafts from North Bergen, he retained his fees from sums saved for 1979 and 1980. The percentage charged by Mr. Gittleman, one-sixth of the savings, had previously been approved by the probate court as reasonable.

Mr. Gittleman did exactly what was asked of him -- he filed tax appeals for Petitioner's properties -- and the fee he retained was based exclusively on the arrangement Petitioner had agreed to during the probate proceeding and which had been approved as reasonable by the probate court. Petitioner later confirmed Mr. Gittleman's retention in writing more than one year after being told of Mr. Gittleman's retention of the funds. As a result of plaintiff's acts, or failure to act, in face of all of the information known to him, he has waived and is estopped from asserting any claims against Mr. Gittleman, whether for sums approved or not approved by the probate court.

Petitioner, by his conduct, led Mr. Gittleman to believe that he approved Mr. Gittleman's acts in preserving Petitioner's tax appeals for 1979 and

1980. Indeed, if Mr. Gittleman did not file and prosecute the tax appeals, Petitioner's right to tax savings in excess of $50,000.00 would have been irretrievably lost. Mr. Gittleman acted in reliance on Petitioner's statements and conduct to prosecute the appeals and Petitioner cannot be heard now to disavow his acts. Petitioner is estopped from attacking Mr. Gittleman's actions. See, e.g., In re Gravure Paper and Board Corp., 234 F.2d 928 (3d Cir. 1956); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 403 A.2d 880 (1979). To permit Petitioner now to attack Mr. Gittleman's acts of preserving Petitioner's rights and obtaining tax reductions for Petitioner would be unconscionable and inequitable and Petitioner must therefore be barred from raising any claims against Mr. Gittleman. See, e.g., State by Parsons v. U.S. Steel

Furthermore, Petitioner's acts of continuing to retain Mr. Gittleman after knowing of Mr. Gittleman's retention of the sums set forth in the Bank's letter to Petitioner constitute a waiver of any claims Petitioner may have against Mr. Gittleman. See, e.g., Mayer v. Development Corp. of America, 541 F. Supp. 828 (D.N.J. 1981); West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 141 A.2d 782 (1958).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

KALB, FRIEDMAN AND SIEGELBAUM

By: _____
MARC S. FRIEDMAN

Dated: May 24, 1985